**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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| STATE OF OKLAHOMA<br><br>Plaintiff,<br><br>v.<br><br>TYSON FOODS, INC., et al.<br><br>Defendants. | ) | Case No. 4:05-cv-00329-GKF-PJC |

**TYSON FOODS, INC., TYSON CHICKEN, INC., TYSON POULTRY, INC., AND COBB-VANTRESS, INC.'S JOINT REPLY TO STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO "TYSON FOODS, INC., TYSON CHICKEN, INC., TYSON POULTRY, INC., AND COBB-VANTRESS, INC.'S MOTION IN LIMINE TO PRECLUDE DEPOSITION TESTIMONY OF PRESTON KELLER. IN SUPPORT OF THEIR MOTION IN LIMINE"**

Come now Defendants Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Poultry, Inc., and Cobb-Vantress, Inc. ("Tyson Defendants"), and reply to State of Oklahoma's Response in Opposition to Tyson Defendants' Motion in Limine to Preclude Deposition Testimony of Preston Keller (Dkt. #2486). In support of their Motion in Limine (Dkt. #2403), Tyson Defendants state as follows:

Plaintiffs have failed to establish, as is their burden, the admissibility of the deposition testimony of Preston Keller, a former Tyson employee. In response to the Tyson Defendants' request to exclude the use of deposition testimony of their former employee, Plaintiffs concede that Mr. Keller does not fall under the language of Rule 32(a)(3) and that the deposition testimony does not fall within Federal Rule of Evidence 801(d)(2)(D). Plaintiffs, however, contend that notwithstanding the absence of an employment relationship between Mr. Keller and the Tyson Defendants at the time of his deposition, the hearsay testimony of Mr. Keller is

admissible under Federal Rule of Civil Procedure 32(a)(4)(B). Plaintiffs assert that Rule 32(a)(4)(B) provides an exception to the general hearsay rule because Mr. Keller is purportedly beyond the reach of this Court. *See* Dkt. #2486 at 5-8. In making this contention, Plaintiffs do not dispute—and, thus, concede—that they bear the burden to establish the admissibility of the subject testimony under the two-pronged analysis discussed in the Tyson Defendants' opening brief: "First, the condition set forth in Rule 32(a) must exist before the deposition can be used at all. Second, when it is found that these conditions authorize the use of the deposition, it must be determined whether the matters contained in it are admissible under the rules of evidence." 8A WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE & PROCEDURE § 2142, at 159.

In their response, Plaintiffs contend that both prongs of this analysis are satisfied by Rule 32(a)(4)(B), which provides that deposition testimony may be used at trial if the witness is more than 100 miles from the place of trial. *See* Fed. R. Civ. P. 32(a)(4)(B). As the sole support for their argument that Mr. Keller falls within the scope of Rule 32(a)(4)(B), Plaintiffs attach a "MapQuest" map allegedly depicting the distance and driving directions from Mr. Keller's residence to the courthouse. *See* Dkt. #2486, Exh. C. This depiction purports to establish that Mr. Keller's home is approximately 112.1 miles from the courthouse.

However, this purported evidence fails to establish that Mr. Keller falls within the scope of Rule 32(a)(4)(B). In this regard, the extant authority indisputably establishes that the 100-mile requirement of Rule 32(a)(4)(B) is measured using straight line distance, i.e., as the crow flies, between the witness's residence or place of employment and the place of the trial, to wit:

> The 100-mile provision allowing for use of a deposition of an absent witness by any party for any purpose is a measurement of the radius from the witness' location to the place of trial measured "as the crow flies," that is, along a straight line on a map rather than along the ordinary, usual, and shortest route of public travel. For these purposes, the "place of trial" is the courthouse where the trial takes place and not the borders of the judicial district in which the courthouse sits

> because the latter would have the unintended effect of providing a variable standard of convenience, depending on the size of the district, the location of the trial, and the location of the witness.

JOHN KIMPFLEN ET AL., 10A FEDERAL PROCEDURE § 26:518;[1] *see SCM Corp. v. Xerox Corp.*, 76 F.R.D. 214, 215-16 (D. Conn. 1977) (noting that the distances under Federal Rules of Civil Procedure 4, 32 and 45 are all determined using a "straight line measurement"); *accord Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 730 (10th Cir. 2006) (noting distances under Federal Rule of Civil Procedure are measured "as the crow flies").

As a crow flies, the distance between Tulsa and Stilwell, Oklahoma, is 78.55 miles, well short of the 100-mile requirement found in Rule 32(a)(4). *See* Exh. A (Google Earth Distance Calculation); *see also* distance calculator linked from the Oklahoma State University website, available at http://journalism.okstate.edu/resources/cal.htm. Moreover, even under the Plaintiffs' apparent road-travel interpretation of the 100-mile requirement, Mr. Keller falls within the Court's subpoena power. Oklahoma Highway 51 connects Tulsa with Stilwell. This direct route is 88.6 miles long, over 23 miles shorter than Plaintiffs' proposed route depicted in Exhibit 3 to Plaintiffs' Response. *See* Exh. B (Google Maps Driving Directions and Map). As such, Plaintiffs' position that they can introduce Mr. Keller's deposition testimony at trial falls apart. Plaintiffs state that "while deposition testimony is ordinarily inadmissible hearsay, Rule 32(a) creates an exception to the hearsay rules." Dkt. #2486 at 5. By the Plaintiffs' own admission, without the exception provided by Rule 32(a)(4), Plaintiffs are prohibited from using Mr. Keller's designated deposition at trial for any purpose.

[1] The *Federal Procedure* treatise cites a number of authorities supporting the "straight line" measurement. *See Richmond v. Brooks*, 227 F.2d 490 (2d Cir. 1955); *Bellamy v. Molitor*, 108 F.R.D. 1 (W.D. Ky. 1983); *United States v. International Business Machines Corp.*, 90 F.R.D. 377 (S.D.N.Y. 1981); *SCM Corp. v. Xerox Corp.*, 76 F.R.D. 214 (D. Conn. 1977).

Though his deposition is inadmissible, Plaintiffs' arguments regarding the relevance and admissibility of Mr. Keller's testimony, some of which constitutes opinion testimony, still warrant a response. First, Plaintiffs use a substantial portion of their response to describe a PowerPoint presentation prepared by Mr. Keller during his employment with Tyson. In a footnote, Plaintiffs argue for the independent admissibility of this PowerPoint presentation. The Defendants will address that argument in the proper proceedings dealing with exhibits rather than in the context of this motion in limine.

Plaintiffs' Response also mischaracterizes Mr. Keller's testimony as lay opinion under Federal Rule of Evidence 701. They argue that to the extent Mr. Keller's testimony constitutes "opinion" testimony, it cannot be "expert opinion" testimony because it is "rationally based on the perception" Mr. Keller gained while working for Tyson. Dkt. #2486 at 8. This approach ignores the final component of Rule 701, which excludes lay opinion testimony "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Much of the testimony designated by Plaintiffs deals with scientific, technical, or otherwise specialized knowledge. Plaintiffs admit as much by stating that "Mr. Keller's testimony also supports the State's substantive claims that phosphorus from land applied poultry waste in the IRW: (1) is running off – and is likely to – runoff; (2) causes water quality problems; and (3) accumulates in the soil." Dkt. #2486 at 7. A witness must possess scientific, technical, or specialized knowledge in order to testify on these issues. Plaintiffs argue that the concept of phosphorus running downhill is well established and not a novel scientific theory, but they then hire experts and modelers to present their position on these topics. Issues regarding runoff and other environmental concerns are beyond the knowledge of laypersons, and opinion testimony

regarding such issues falls under Federal Rule of Evidence 702. Plaintiffs have not satisfied the requirements of Rule 702 with respect to Mr. Keller's testimony.

Contrary to Plaintiffs' assertions, Mr. Keller lives within 100 miles of the courthouse and is not unavailable under Rule 32(a)(4). Therefore, Mr. Keller's deposition testimony is hearsay. His deposition testimony was not given during the course of his employment and cannot serve as an admission by a party opponent. Additionally, even if Mr. Keller's deposition testimony did not constitute hearsay, his opinions do not meet the requirements of either Federal Rule of Evidence 701 or Federal Rule of Evidence 702. In short, Plaintiffs have no basis to present the testimony of Mr. Keller via his deposition.

WHEREFORE, Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Poultry, Inc., and Cobb-Vantress, Inc., respectfully request that the Court grant their Motion in Limine to Preclude Deposition Testimony of Preston Keller.

Respectfully submitted,

BY: /s/ *Michael R. Bond*

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CERTIFICATE OF SERVICE

I certify that on the 28th day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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